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No. 96-8986

In the Supreme Court of the United States

OCTOBER TERM, 1997

ARNOLD F. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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All of the participants in this case agree that, in *House* v. *Mayo*, 324 U.S. 42 (1945) (per curiam), this Court held that it lacked statutory certiorari jurisdiction to review the refusal by a court of appeals to issue a certificate of probable cause but that the Court could nonetheless issue a common-law writ of certiorari under the All Writs Act, 28 U.S.C. 1651. U.S. Br. 21; Pet. Br. 13-15; Court-Appointed Amicus Curiae Br. (Amicus) 21, 35-36. In our view, the holding in *House* controls this case. There is no meaningful distinction between the Court's power at the time of *House* to review the decision of a court of appeals denying a certificate of probable cause and its power

today to review the decision of a court of appeals denying a certificate of appealability.

1. a. Petitioner requests (Pet. Br. 9) that this Court disregard *stare decisis* and overrule *House*'s holding that the Court lacks statutory certiorari jurisdiction on the grounds that the holding is incorrect and "appears to have been renounced by this Court in subsequent decisions." The basic premise of *stare decisis*, however, is that a prior decision is not to be disregarded merely because the Court now believes that it was wrongly decided. "[I]t is more important that the applicable rule of law be settled than that it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). "Who ignores [*stare decisis*] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." *Hubbard* v. *United States*, 514 U.S. 695, 716 (1995) (Scalia, J., joined by Kennedy, J., concurring in part and concurring in the judgment). Respect for precedent has "special force in the area of statutory interpretation, for * * * Congress remains free to alter what [this Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989). Despite petitioner's contention that later cases "appear[] to have * * * renounced" *House*'s holding (Pet. Br. 9), the Court's opinions in those cases are silent on the jurisdictional question and therefore cannot be read to have overruled *House sub silentio*. See U.S. Br. 26.

b. Petitioner also raises two issues as insurance, in case the Court overrules the second component of the holding in *House* and rejects its power to review the decision of the court of appeals by common-law certiorari. Petitioner first contends (Pet. Br. 40-44)

that he does not in fact need a certificate of appealability in order to appeal the merits of his Section 2255 motion. That claim is not properly before the Court, because petitioner failed to raise the claim in the court of appeals or in his petition for certiorari, and because the claim is not fairly subsumed in the question on which the Court granted review. See *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

Petitioner's claim lacks merit in any event. As we explained in our response to the petition for certiorari (at 10-12), petitioner's notice of appeal had not been filed at the time Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Therefore, *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2063 (1997), does not control petitioner's case. Nor do the Court's precedents regarding retroactive application of statutes, see, *e.g.*, *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), prevent application to petitioner's appeal of the requirement that petitioner obtain a certificate of appealability. That requirement is a jurisdictional prerequisite to consideration of the merits of petitioner's Section 2255 motion by the court of appeals. See *id.* at 274 (noting that the Court has regularly applied statutes ousting jurisdiction to pending litigation). Moreover, petitioner's Section 2255 motion is a form of prospective relief. See *ibid.* (explaining that an individual does not have a "vested right" to relief that operates "*in futuro*"). The certificate requirement is purely procedural and regulates "secondary rather than primary conduct." *Id.* at 275 (opining that procedural requirements "may often

be applied in suits arising before their enactment without raising concerns about retroactivity"). Finally, because the district court had not ruled on petitioner's motion when the AEDPA was enacted, the requirement that petitioner obtain a certificate was in place well before the time at which petitioner was obliged to seek one. Application of the requirement to petitioner's appeal is therefore prospective, and raises no retroactivity concerns.

Petitioner's additional fall-back claim, that this Court should itself grant a certificate of appealability (Pet. Br. 44-49), is similarly not properly before the Court in the present case. Petitioner raised that claim as well for the first time in his merits brief, and it too is not subsumed in the question on which the Court granted review. Even were the issue properly before the Court, petitioner is not entitled to a certificate from this Court or a Justice of the Court, as we have explained in our response to the application for a certificate of appealability that petitioner submitted on January 21, 1998. See U.S. Mem. in Opp., No. A-527 (filed Jan. 29, 1998).

2. Like petitioner, amicus requests (Br. 35-36) that this Court disregard *stare decisis* and part of its holding in *House*. Unlike petitioner, however, amicus would have the Court jettison the part of *House*'s holding that made clear that the Court may use common-law certiorari under the All Writs Act to review a court of appeals' denial of a certificate authorizing appeal. Amicus offers three reasons for the Court to disregard *House*, none of which is persuasive.

a. First, amicus attempts to distinguish *House* by asserting (Br. 3-4, 13, 24, 35-37) that a Justice of this Court may issue a certificate authorizing appeal under current law but lacked that authority at the time *House* was decided. That assertion is incorrect. Moreover, even if it were correct, it would not deprive this Court of the power under the All Writs Act to review the decision of a court of appeals denying a certificate.

Amicus bases his assertion that a Justice of this Court could not have issued a certificate at the time *House* was decided on 28 U.S.C. 466 (1940). See Br. 36, A1. That Section provided:

> From a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the circuit court of appeals shall be allowed unless the United States court by which the final decision was rendered or a judge of the circuit court of appeals shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or judge shall certify that there is probable cause for such allowance.

28 U.S.C. 466 (1940). The 1940 Code, however, used the term "judge of the circuit court of appeals" to include the Justice of this Court allotted to that circuit. See 28 U.S.C. 217 (1940) ("The words 'circuit justice' and 'justice of a circuit' shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word 'judge', when applied generally to any circuit, shall be understood to include such justice."). See also *In re Neagle*, 135 U.S. 1, 54 (1890) (Justices of this Court "are also judges of the Circuit Courts of the United States."). Thus, the distinction that amicus would find between

the circumstances of this case and *House* simply does not exist.

The power of a circuit justice at the time *House* was decided to issue a certificate is confirmed by review of Section 6(d) of the Act of February 13, 1925, ch. 229, 43 Stat. 940, the statute on which the codifiers based the language of Section 466. That Section of the United States Code was not enacted into positive law, so it is only "prima facie" evidence of the law, which must be determined by reference to the language of the statute that Congress actually passed. See *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 448 (1993); see also 1 U.S.C. 204(a).

The Act, which changed the law to provide that appeals from habeas corpus cases would go to the circuit courts of appeals rather than to the Supreme Court, stated, in relevant part, that "the provisions of an Act entitled 'An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings,' approved March 10, 1908, shall apply to appellate proceedings [in the circuit courts of appeal] as they heretofore have applied to direct appeals to the Supreme Court." Act of Feb. 13, 1925, ch. 229, § 6(d), 3 Stat. 940. The Act of March 10, 1908, ch. 76, 35 Stat. 40, in turn, provided:

> That from a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Section 6(d) clearly intended to make a certificate of probable cause a prerequisite to appeal to the circuit courts of appeals, but its intent to deprive a Justice of this Court of the ability to issue a certificate is far from clear. Tellingly, we could find nothing in the legislative history of the 1925 Act, which included an extensive list of the intended changes to existing law, to suggest that Congress meant for Section 6(d) to divest a Justice of the pre-existing power to grant a certificate. See *American Hospital Ass'n* v. *NLRB*, 499 U.S. 606, 613-614 (1991); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979); *Ex parte Peru*, 318 U.S. 578, 585 n. 4 (1943) (finding it "hardly conceivable" that the legislative history of the 1925 Act would lack any indication of an intent to limit this Court's jurisdiction to issue extraordinary writs if the Act did so). Repeals of jurisdiction by implication are not favored. See *Felker* v. *Turpin*, 116 S. Ct. 2333, 2338-2339 (1996). Because Supreme Court Justices were also members of the Circuit Courts of Appeals when Section 6(d) was enacted, see Act of March 3, 1911, ch. 231, §§ 117-121, 36 Stat. 1131-1132, the best reading of Section 6(d) is that *all* circuit judges, including the circuit justice, had the power to issue a certificate. Indeed, Congress confirmed that interpretation when it enacted Title 28 of the United States Code into positive law and explicitly provided that a "circuit justice or judge" could issue a certificate. See Act of

June 25, 1948, ch. 646, § 2253, 62 Stat. 967 (codified at 28 U.S.C. 2253 (1952)).[1]

Even if it were true that a Justice of this Court can issue a certificate of appealability under current law but could not issue one when *House* was decided, there would be no reason to disregard the holding in *House*. Amicus contends (Br. 12-13, 19-20, 30-31, 35-37) that the power to issue a certificate makes using a common-law writ neither "necessary" nor "appropriate," because granting the certificate directly is an "alternative" remedy. Amicus ignores, however, that

[1] The House Committee Report accompanying the 1948 Act does not indicate that the relevant Section of the Act made any substantive change but states rather that "[c]hanges were made in phraseology." H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947). We acknowledge that the proper interpretation of 28 U.S.C. 217 (1940), which clarifies the meaning of the term "judge of the circuit court of appeals" in 28 U.S.C. 466 (1940), is not free from all doubt. Section 217 of the Code is based on Section 121 of the Act of March 3, 1911, ch. 231, 36 Stat. 1132. The statutory provision is identical to the code provision except that the statutory provision contains the phrase "when used in this title" after "justice of a circuit." That phrase suggests that the provision was designed to clarify the terminology used in the "title" of which it was a part. Because neither Section 6(d) of the 1925 Act nor 28 U.S.C. 466 (1940) existed in 1911, it is unclear whether they should be considered encompassed in the same "title" as Section 121 of the 1911 Act. Clarification is provided, however, by the fact that Section 121 of the 1911 Act reproduced verbatim Section 605 of the Revised Statutes. Title XIII of the Revised Statutes contained all the laws of the United States related to the judiciary, including Section 605 and those Sections governing habeas corpus. See Rev. Stat., Tit. XIII, ch. 6 (1874). Thus, it is reasonable to conclude that Congress intended "judge of the circuit court of appeals" to include the "circuit justice" in all laws related to the judiciary, including those governing habeas corpus.

another "alternative" remedy—an original petition in this Court for habeas corpus—indisputably existed at the time this Court decided *House*. See 28 U.S.C. 451 (1940). As we have explained (U.S. Br. 31-34), the existence of some other means by which the Court could "physically discharge its appellate duties," *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942), does not prevent use of an extraordinary writ. See, *e.g.*, *U.S. Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 204 (1945) (using common-law certiorari to review interlocutory order even though final judgment was subject to review on appeal); *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945) (same with respect to preliminary injunction); *Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952) (same with respect to denial of motion to dismiss); *Felker*, 116 S. Ct. at 2341 (Stevens, J., joined by Souter & Breyer, JJ., concurring) (explaining that the Court has jurisdiction both to consider an original petition for habeas corpus and to review, pursuant to the All Writs Act, an order denying a prisoner the right to file a successive habeas petition).

Use of a common-law writ in this case is "reasonably necessary in the interest of justice," *Adams*, 317 U.S. at 274, and "appropriate," 28 U.S.C. 1651(a). Reliance on an application for a certificate of appealability or an original petition for habeas corpus would be an unduly cumbersome way for this Court to preserve the potential to review the merits of petitioner's Section 2255 motion or to supervise the interpretation by the courts of appeals of the standard for issuing certificates. The Court can use common-law certiorari to consider only those specific and discrete legal issues of public importance that it

believes warrant its attention. Cf. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (explaining that Court should confine its attention to issues of broad public importance). Passing on an application for a certificate or granting an original habeas petition, in contrast, would require the Court to review the entire case, to determine the appropriate legal standards, and to apply the applicable legal standards to the facts of the case. In addition, the decision whether to issue a certificate or grant a petition for habeas corpus requires detailed consideration of the particular facts of the case, a task more easily and more appropriately performed by a court or judge closer to the record. See *Lyons* v. *Ohio Adult Parole Auth.*, 105 F.3d 1063, 1072 (6th Cir.), cert. denied, 117 S. Ct. 1724 (1997); *Hunter* v. *United States*, 101 F.3d 1565, 1580-1581 (11th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 1695 (1997); D. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Sup. Ct. Rev. 153, 192-194 (identifying difficulty in resolving factual issues as a reason for this Court's reluctance to consider original petitions for habeas corpus). Thus, common-law certiorari would be a more focused and efficient use of the Court's resources than the highly case-specific alternatives that might be invoked.[2] See U.S. Br. 32-34.

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[2] The response to petitioner's application for a certificate of appealability that amicus has requested leave to file underscores the potential of the certificate process to consume this Court's resources. Amicus suggests that the Court would have to canvas a wide range of laws and precedents to decide whether petitioner's claims are constitutional in nature (Resp. 1-7); that the Court would have to venture into the thickets of analysis under *Teague* v. *Lane*, 489 U.S. 288 (1989), to decide whether any claim that is constitutional is a new rule that may not be raised in a proceeding under Section 2255 (a task amicus would have this Court shoulder even though the United States has not raised *Teague*) (Resp. 7-8); and that the Court would have to raise and resolve a similar myriad of issues at the behest of *any* petitioner in *any* application, because no petitioner "must demonstrate 'exceptional circumstances' before being eligible to obtain a certificate of appealability from the Supreme Court under 28 U.S.C. 2253" (Resp. 1). Amicus's sanguine view that an application for a certificate could be resolved in "days or at most weeks" (Br. 19) must be assessed with a skeptical eye given his assertion that this Court *must* pass on all the legal and factual issues, large and small, that turn up in an application, without even the discretion to demand "exceptional circumstances" before making that use of this Court's scarce resources. In contrast, our suggestion that the Court vacate the judgment and remand for further consideration would enable the court of appeals in the first instance to pass on the legal issues presented in light of the government's current position. That court's additional consideration of this case may obviate any further need for this Court to intervene.

Finally, in some instances, application to a Justice of this Court for a certificate would not enable the Court, even through that more burdensome route, to correct error by a court of appeals. For example, in a case in which a court of appeals requires a certificate even though the statute does not require one, this Court would not have jurisdiction to entertain an application for a certificate and would therefore be unable to redress the error of the court of appeals.[3]

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[3] Amicus also relies (Br. 20, 31) on Supreme Court Rule 20.1, which requires a demonstration that "adequate relief cannot be obtained in any other form." That rule, however, is not jurisdictional and is therefore not relevant to the question presented in this case, as even the cases cited (Br. 33-34) by amicus demonstrate. See, *e.g.*, *Ex parte Peru*, 318 U.S. at 584 (explaining that "common law writs * * * are *usually* denied

b. The second reason proffered by amicus (Br. 12-13, 19-20, 30-38) for this Court to depart from *House* is that its holding is inconsistent with cases and principles delimiting the Court's power under the All Writs Act. Amicus repeatedly contends (Br. 13, 20, 32-34) that a common-law writ of certiorari is unavailable because "'express statutory provision[s]' * * * prohibit jurisdiction." Amicus, however, fails to identify those provisions.

Nowhere in the statutes at issue in this case did Congress expressly or by implication preclude this Court from using common-law certiorari to review the decision of a court of appeals denying a certificate of appealability. That limitation cannot be inferred from 28 U.S.C. 2253(c)(1) (Supp. II 1996), which limits "appeal * * * to the court of appeals" from the "final order in a proceeding under section 2255." Section 2253(c)(1) says nothing about certiorari, nothing about review by the Supreme Court, and nothing about review of a decision on an application for a certificate of appealability. In stark contrast, 28 U.S.C. 2244(b)(3)(D) (Supp. II 1996) expressly provides that certiorari is not available to review the denial by

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where other adequate remedy is available") (emphasis added); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943) (explaining that the issue whether mandamus may be used "as a substitute for the appeal procedure prescribed by statute" is not a question of the "power to grant the writ" but whether "exercise of that power" is "appropriate"). See also *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 254-255 (1957) (noting a court's power to grant mandamus even though the court would have appellate review over the case later in the process). In any event, the available alternatives are not adequate for the reasons described above.

a court of appeals of a motion to file a successive petition.[4]

Nor can any limitation be inferred from the authorization in Section 2253(c)(1) for a circuit justice to grant a certificate. Amicus suggests (Br. 26) that Congress intended that authorization to serve as the exclusive means for a prisoner to seek review of the denial by a court of appeals of the prisoner's request for a certificate. The language of Section 2253(c)(1), however, does not support amicus's suggestion. The Section does not provide that a prisoner should seek a certificate first from a circuit judge, and then, if the circuit judge denies the certificate, from a Justice of this Court. The Section simply provides that either a "circuit justice or judge" may issue a certificate, without characterizing the action of the circuit justice as review of the action of a lower court denying a certificate. Congress has similarly long provided that a prisoner may file an original petition for habeas corpus in this Court. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. This Court has never suggested, however, that its power to consider an original petition displaces its power to review the judgment of a court of appeals on a petition that is not filed in the first instance in this Court.[5]

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[4] The contention of amicus (Br. 26) that Section 2244(b)(3)(D) simply represents "a double, as opposed to a single, statutory knot precluding certiorari review" turns statutory construction on its head. Rather than assume Congress has included unnecessary language to emphasize a point, "the Court will avoid a reading which renders some words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

[5] To the contrary, the failure first to seek appellate review of the denial of a petition for habeas corpus filed in the lower

Finally, amicus cannot contend that the mere existence of statutory certiorari prevents this Court from issuing a common-law writ of certiorari under the All Writs Act. The two sources of certiorari jurisdiction have coexisted for more than a century. See Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828 (creating statutory writ of certiorari); Act of Sept. 24, 1789, ch. 20, §§ 13, 14, 1 Stat. 80-81 (enacting original All Writs Act). This Court has never suggested that Congress's decision to create a new statutory writ of certiorari effectively repealed the Court's authority under the All Writs Act to issue the common-law writ. To the contrary, in *McClellan* v. *Carland*, 217 U.S. 268 (1910), the Court specifically held that it could grant a common-law writ of certiorari under the All Writs Act even though it could not grant certiorari under the statutory certiorari provisions enacted in 1891. *Id.* at 277-280.[6]

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courts is a reason to deny an original petition in this Court. See *Norris* v. *Swope*, 72 S. Ct. 1020, 1021 (1952) (Douglas, J., in chambers). The requirement that a prisoner exhaust the possibility of relief from the district courts and courts of appeals before filing an original petition for habeas corpus in this Court was established by case law as early as 1887, see, *e.g.*, *Ex parte Mirzan*, 119 U.S. 584, 586 (1887), and was later codified by the Act of June 25, 1948, ch. 646, § 2242, 62 Stat. 965.

[6] Because no statutory provision "specifically addresses the particular issue at hand," *Carlisle* v. *United States*, 116 S. Ct. 1460, 1467 (1996), neither *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34 (1985), nor *Carlisle* can bear the weight that amicus would put on them (Br. 30-33). *Carlisle* involved Federal Rule of Criminal Procedure 29(c), which expressly requires that a motion for acquittal be filed within seven days after the jury is discharged. The Court simply held that the All Writs Act does not provide authority for a district judge to grant a motion for

Cases such as *McClellan* also dispose of amicus's contention (Br. 12, 19-20, 37-38) that a common-law writ of certiorari is not "in aid" of this Court's appellate jurisdiction. Amicus suggests (Br. 37) that an extraordinary writ can never be in aid of the Court's jurisdiction unless the Court has other "existing appellate authority." The Court, however, has frequently used the common-law writ of certiorari to bring before it appeals when it lacks other appellate authority. See *McClellan*, 217 U.S. at 280 (holding that an extraordinary writ "may issue in aid of the appellate jurisdiction which otherwise might be defeated by the unauthorized action of the court below"). See also *House*, *supra*; *Holiday* v. *Johnston*, 313 U.S. 342, 348 n.2 (1941); *Whitney* v. *Dick*, 202 U.S. 132, 135 (1906); *In re Chetwood*, 165 U.S. 443, 462

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acquittal filed on the eighth day after discharge on the theory that the order granting the motion is tantamount to a writ of coram nobis. 116 S. Ct. at 1467. The Court first noted that the defendant did not ask for that writ, the district court did not purport to issue the writ, and the writ has not traditionally been available to order an acquittal for insufficient evidence. *Ibid.* The Court added, as additional support for its conclusion, that the writ could not in any event be used to evade the time limits expressly set by Rule 29(c) for granting a motion for acquittal. 116 S. Ct. at 1467-1468. In *United States Marshals*, a magistrate issued a writ of habeas corpus *ad testificandum* to compel the United States Marshals Service to bring five witnesses in state custody to the federal courthouse. 474 U.S. at 35. The Court held that, under 28 U.S.C. 2243, the writ could not be directed to the Marshals because they did not have custody over the prisoners. 474 U.S. at 38-39. The Court also dismissed an argument that the magistrate's order was authorized under the All Writs Act, because the All Writs Act does not authorize the issuance of writs, such as the writ of habeas corpus *ad testificandum*, that are otherwise "specifically provided for by statute." *Id.* at 41-43.

(1897). In this case, if the court of appeals had issued a certificate, this Court would have had jurisdiction to review the merits of petitioner's Section 2255 motion under 28 U.S.C. 1254(1). That is all the appellate authority necessary to empower the Court to issue a writ under the All Writs Act.

c. The final reason proffered by amicus (Br. 18-19) for disregarding *House* is that allowing review by certiorari of the denial of an application for a certificate would result in an unworkable "two-track system of appellate review." The possibility of two tracks of review arises because a court of appeals may deny a certificate as to one or more issues raised by a prisoner but grant a certificate as to one or more other issues. As amicus acknowledges (*id.* at 38-39), however, "policy considerations" are "best addressed to members of Congress."

In any event, the policy concerns expressed by amicus are not affected by the outcome of the question presented in this case. The potential for two tracks of appellate review exists whether a prisoner seeks review of the denial by a court of appeals of a certificate by petitioning for certiorari or by filing an application for a certificate with a Justice of this Court. Amicus suggests (Br. 19) that two-track review will present less of a problem if this Court's review is limited to an application for a certificate, because individual Justices historically have disposed of applications more speedily than the Court has disposed of cases on certiorari. Historical experience with other applications, however, is not necessarily a good guide. As discussed at pages 9-10 & note 2, *supra*, deciding an application for a certificate could require a Justice or the Court to pass on a wide range of issues. As in this case, an application could require

resolution of more legal and factual issues than the Court would address if it limited review to important legal issues through the certiorari process.[7] Thus, it is speculative whether applications for certificates will be resolved more quickly than petitions for certiorari. Indeed, because certificates of appealability may be filed at any time, using them rather than common-law writs of certiorari may actually result in more disruption of the appellate process. Compare 28 U.S.C. 2101(c) (any petition for certiorari must be filed within 90 days after the entry of the judgment of which review is sought unless the time is extended for good cause). In any event, the Court could avoid the two-track review problem by deciding that it will ordinarily deny certiorari when a court of appeals has granted authorization to appeal some issues but not others. The Court could instead consider whether to review the entire case after the court of appeals has passed on those issues for which it authorized appeal.

3. This case is easily resolved if the Court declines the requests of both petitioner and amicus to depart from precedent and instead adheres to its holding in *House* v. *Mayo*, *supra*. That resolution is supported by *stare decisis* and consistent with the plain language of the statutory provisions involved in this case, the other precedents of this Court, and the principle that repeal of this Court's jurisdiction by implication is not favored, see *Felker*, 116 S. Ct. at 2338.

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[7] For example, as we explained in our motion in opposition to the application for a certificate of appealability filed by petitioner (U.S. Mem. in Opp. 6), the Court would have to decide whether petitioner has made a substantial showing that he can excuse his procedural default—either because he can show cause and prejudice or because he is actually innocent.

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For the foregoing reasons, and those stated in our opening brief, this Court has jurisdiction under the All Writs Act to grant the petition for certiorari, vacate the judgment of the court of appeals, and remand for further consideration.

Respectfully submitted.

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Solicitor General

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